

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

----

In re DELILAH H., a Person Coming Under  
the Juvenile Court Law.

PLACER COUNTY DEPARTMENT OF HEALTH AND  
HUMAN SERVICES,

Plaintiff and Respondent,

v.

JAMES N.,

Defendant and Appellant.

C069294

(Super. Ct. No.  
53-002866)

James N., the alleged father (hereafter father) of the nearly four-year-old minor, Delilah H., appeals from an order of the Placer County Juvenile Court appointing a legal guardian for the child and dismissing the dependency. On appeal, father contends the juvenile court erred when it refused to appoint

counsel to represent him at the selection and implementation hearing. (Welf. & Inst. Code, § 366.26.)<sup>1</sup> We affirm the order.

#### FACTUAL AND PROCEDURAL BACKGROUND

Father has not been married to Shannon S., the mother of Delilah. At the times of Delilah's conception and birth, mother was married to Mike S.

##### *Originating Circumstances*

In July 2009, mother was arrested for driving under the influence of a controlled substance while Delilah was in the car. A probation search of mother's residence yielded a controlled substance and paraphernalia.

##### *Petition*

The Placer County Department of Health and Human Services (Department) filed a petition pursuant to section 300, subdivisions (b) and (g). The petition alleged that mother abuses controlled substances and drove under the influence with Delilah in the car; and that both mother and father are incarcerated, leaving Delilah without provisions for care and support.<sup>2</sup>

---

<sup>1</sup> Further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

<sup>2</sup> The petition was also brought on behalf of the half sibling, Ashley M., mother's child with another man. No issues related to Ashley are presented in this appeal.

### *Detention*

Father was not present at the detention hearing. The paternal grandmother, Barbara N., was present. She advised the court that father was incarcerated at Deuel Vocational Institute (DVI).

The juvenile court inquired regarding father's relationship with Delilah. Mother indicated she never was married to father, she was not living with him when Delilah was conceived, and he was not present when Delilah was born.

Mother listed father on paperwork provided by the hospital and thus believed that father was listed on Delilah's birth certificate. Father never lived with Delilah and visited her just once, when mother brought her to see him. Mother acknowledged that she was married to Mike S. when Delilah was conceived and born.

The juvenile court stated it would defer any paternity finding with respect to father. The court advised mother that, when a woman is married to a man and has a child during the marriage, the man is presumed to be the father but that presumption "can be rebutted with other facts." But right now [Mike S.] carries some weight in this case, as does [father]. We will have to sort that out."

The paternal grandmother advised the court that "there is a DNA test in place for this, and my son signed the papers." The court replied that, if "there has been genetic testing that found [father] to be the biological father, that would be helpful."

Delilah was ordered detained.

*Jurisdiction and Disposition*

The Department confirmed that father was incarcerated. He was not interviewed for the jurisdiction/disposition report.

The Department recommended denying reunification services because father "is merely an alleged father." It asked the court to defer a finding of Delilah's paternity pending a DNA test.

Father has a criminal record that includes several felony convictions. In January 2009, father was convicted of receiving stolen property and sentenced to state prison for 32 months.

In October 2007, mother obtained a restraining order against father. She said she did so because father had kidnapped and raped her; Delilah was conceived as a result of the incident. The order expired in November 2010.

Prior to the jurisdiction/disposition hearing, the Department filed an amended petition that included additional allegations related to the half sibling, Ashley M.

Father did not appear at the uncontested hearing on September 2, 2009. He remained in prison at DVI.

Father waived his appearance at the continued, uncontested hearing on October 9, 2009. Michael S. was excluded as the biological father of Delilah. The court ordered a paternity test for father. The Department was given discretion to allow father overnight visits at his treatment facility. A contested hearing was set.

Father waived his appearance at the contested hearing on November 20, 2009. The hearing did not proceed because the Department changed its recommendation and asked the court to grant reunification services with respect to the half sibling. The court sustained the amended petition.

Father was denied reunification services pursuant to section 361.5, subdivision (a).

The paternal grandmother informed the juvenile court that father was not able to attend the hearing because he was ill and undergoing treatment for valley fever. She conveyed father's desire to be a father to Delilah. The court stated it had not received any DNA test information.

#### *Six-Month Review*

In March 2010, the juvenile court received from the Department DNA test results indicating a high probability that father is the biological father of Delilah.

The six-month review was conducted in May 2010. The matter was set for a 12-month review in September 2010.

#### *12-Month Review*

Father was not present at the 12-month review in September 2010. The Department recommended terminating reunification services for mother and the father of Ashley M. The matter was set for a contested hearing.

The paternal grandmother informed the court that father was incarcerated at Mule Creek State Prison and that he had asked her "to speak to you regarding his rights to Delilah." She

added that father loved Delilah and asked the court to "assign him a lawyer."

The juvenile court replied, "I believe I found him to be an alleged father," and, as an alleged father, he was not entitled to appointed counsel. Because he was an alleged father, he had been bypassed for reunification services, and he had been notified of his right to appeal from the bypass ruling.

The juvenile court recommended that, upon his impending release from prison, father contact the social worker to set up visits with Delilah. The court added "he should probably himself -- or maybe the family can assist him, your family, in hiring an attorney to take a look at what's involved in him starting to try to become -- moved from an alleged father in the family law code to what's called a presumed father." The court added: "Maybe he needs to hire his own attorney. Because right now as an alleged father, he's not entitled to court appointed counsel."

Father made his first appearance at the contested hearing on November 17, 2010. The paternal grandmother was also present. The hearing did not go forward because the Department asked the court to continue services for mother.

The juvenile court informed father that he had not been offered reunification services at disposition because the court had found that he was an alleged father and he had waived his appearance. Father explained that he had waived his appearance because he was in the middle of medical treatment, too ill to appear; and he believed his counselor would notify the court.

Father stated that he anticipated entering a treatment program and continuing his treatment for valley fever.

The juvenile court asked counsel how they wished to proceed with respect to father now that he was out of custody and making an appearance. The Department's counsel suggested father have monthly visits because he is "merely an alleged father" and the permanence hearing was imminent. Father acknowledged that he had seen Delilah only once, during visitation at a county jail. Father stated he would accept whatever visitation the court would allow.

The juvenile court deduced, and the Department's counsel acknowledged, that father was Delilah's biological father; but he "has not risen to presumed father status given the fact he was incarcerated for that length of time." Father was allowed supervised monthly visits in the company of the paternal grandmother.

#### *18-Month Review*

Father appeared with counsel on March 23, 2011. Mother submitted on the Department's recommendation to terminate reunification services but asked for a bonding study. Father's counsel made no request on father's behalf.

The juvenile court set a selection and implementation hearing and advised father that he had a right to file a writ petition. The court told father that, if he had any questions, his counsel could provide answers. When the court inquired if there was anything further, father's counsel responded, "No, your Honor."

### *Selection and Implementation*

Father waived his right to appear at the September 2011 selection and implementation hearing. The juvenile court remarked, "He signed a waiver of his right to be here today. He indicated that he would like an attorney to be appointed to represent him to appear at the hearing, but [he] is an alleged father and he is not entitled to representation."

The Department recommended that Delilah be in a legal guardianship with the maternal grandmother. The court found that the children would benefit from continuing their parent-child relationships with the parents; that the maternal grandmother was a proper guardian; and that removal from her care would be detrimental. Based on these findings, the court granted the guardianship.

Because no further protective problems existed with respect to Delilah, the juvenile court ordered the dependency dismissed.

### DISCUSSION

Father contends the juvenile court erred when it (1) failed to advise him of his right to appointed counsel if he could not afford his own attorney, (2) failed to inquire about his financial status, (3) failed to determine his eligibility for appointed counsel based on that financial status, and (4) applied an impermissible standard for the appointment of counsel, which was at variance with and more constrained than the standard provided by statute.

Specifically, father argues that under section 317, subdivision (b), the court must appoint counsel when "it appears



to the court that a parent . . . of the child is presently financially unable to afford and cannot for that reason employ counsel.”<sup>3</sup> (Accord, Cal. Rules of Court, rule 5.534(g), (h)(1)(B).)<sup>4</sup> He notes that the juvenile dependency scheme includes due process safeguards including “a right to court-appointed counsel for a parent who cannot afford to retain counsel [citing § 317].” (*In re James F.* (2008) 42 Cal.4th 901, 904.)

Father notes that by their terms, section 317 and the rules of court apply to a “parent”; thus, he reasons, the statutory mandate applies to him. However, case law omitted from father’s briefing has limited the appointed counsel right to a subset of fathers that does not include him. By failing to discuss the relevant law, father has forfeited any contention that the law does not apply to this case. (E.g., *People v. Hardy* (1992) 2 Cal.4th 86, 150; *People v. Wharton* (1991) 53 Cal.3d 522, 563.)

“California law distinguishes “alleged,” “biological,” and “presumed” fathers. [Citation.] “A man who may be the father of a child, but whose biological paternity has not been established, or, in the alternative, has not achieved presumed father status, is an ‘alleged’ father.” [Citation.] “A

---

<sup>3</sup> Father’s reliance on *In re Christine P.* (1991) 233 Cal.App.3d 255, is misplaced because the opinion was superseded by grant of review (review granted Apr. 25, 1991, S019675), (review dismissed Dec. 19, 1991, S019675).

<sup>4</sup> Further references to “rules” are to the California Rules of Court.

biological or natural father is one whose biological paternity has been established, but who has not achieved presumed father status . . . .” [Citation.] ‘Presumed father status ranks highest’ [citation], and ‘[o]nly presumed fathers are entitled to reunification services and to possible custody of the child’ [citation].” (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1461.)

“‘[T]he term “presumed father” is . . . a term of convenience used to identify a preferred class of fathers by reference to the familial bonds described in [Family Code] section 7611 which the Legislature has determined reasonably approximates the class of fathers it wishes to benefit.’ [Citation.] *Only a statutorily presumed father is entitled to appointed counsel, custody (if there is no finding of detriment) and reunification services.* [Citation.] In contrast, a biological father is not entitled to these rights merely because he wants to establish a personal relationship with his child. [Citation.] This is because a presumed father, who has lived with a child and treats the child as a son or daughter, has developed a parent-child relationship that should not be lightly dissolved. This type of familial relationship is much more important, at least to the child, than a biological relationship of actual paternity. [Citation.] “‘Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.’” [Citations.]” (*In re P.A.* (2011) 198 Cal.App.4th 974, 980, italics added; *In re T.R.* (2005) 132 Cal.App.4th 1202, 1209.)

Under these authorities, father had no right to appointed counsel at any stage of the proceeding because he never attained the status of presumed father.

We are aware of dictum in *In re J.O.* (2009) 178 Cal.App.4th 139 that “[a]n alleged father is not entitled even to appointed counsel, *except for the purpose of establishing presumed fatherhood.* [Citations.]” (*Id.* at p. 147, italics added.) Father does not contend his goal in seeking appointment of counsel was to establish his status as Delilah’s presumed father; any such contention is forfeited. (*People v. Hardy, supra*, 2 Cal.4th at p. 150; *People v. Wharton, supra*, 53 Cal.3d at p. 563.) In any event, there was not sufficient evidence from which appointed counsel could plausibly have argued that father, who had never lived with Delilah, had developed the sort of parent-child relationship that should not lightly be dissolved. (*In re P.A., supra*, 198 Cal.App.4th at p. 980.)

Because the juvenile court’s refusal to appoint counsel for father was not error, we reject father’s contention that the error was a structural defect not susceptible to harmless error analysis.

Father responds that he nevertheless had a federal due process right to appointed counsel. However, the California Supreme Court has held that the federal constitutional guarantees of due process and equal protection apply only to unwed fathers who promptly come forward and demonstrate a full commitment to their parental responsibilities. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 450; *Adoption of Kelsey S.* (1992)

1 Cal.4th 816, 849.) Father, who was incarcerated for most of Delilah's life and had never provided her a nurturing environment, did not demonstrate the requisite commitment for due process purposes.

DISPOSITION

The order is affirmed.

\_\_\_\_\_  
NICHOLSON, J.

We concur:

\_\_\_\_\_  
BLEASE, Acting P. J.

\_\_\_\_\_  
BUTZ, J.